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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,)

9 Plaintiff,)

10 vs.)

11 JOSEPH JEFFEREY BRICE,)

12 Defendant.)

11-CR-00075-LRS

United States' Notice of
Clarification to ECF Doc. 269

14 Plaintiff, United States of America, by and through Michael C. Ormsby,
15 United States Attorney for the Eastern District of Washington, and Russell E.
16 Smoot, Assistant United States Attorney for the Eastern District of Washington,
17 respectfully submits the United States' Notice of Clarification to ECF Doc. 269.

18 RESPONSE

19 On May 22, 2012, the United States filed a *Response to Motion for*
20 *Emergency Hearing re: Violation of Attorney-Client and/or Work-Product*
21 *Privilege* ECF Doc. 269. In the *Response*, the United States represented that the
22 documents seized during the U.S. Marshal Service search of the Defendant's
23 Spokane County Jail cell were reviewed as follows:
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1 According to the USMS and the Federal Bureau of Investigation
2 ("FBI") oral report to the United States Attorney's Office on May 18,
3 2012, and May 22, 2012, a two-step procedure was used to assure that
4 *attorney-client privilege material* was not seized during the search.
5 First, a USMS Deputy Marshal participating in the search separated
6 material that appeared to possibly be legal material. Such
7 legal-appearing material was not removed from the Defendant's cell.
8 Second, prior to review by FBI Special Agent Bomb Technician
9 ("SABT") McEuen (investigation case agent), FBI Intelligence
10 Analyst ("IA") John Pulcastro, who has not previously participated in
11 the investigation of Defendant BRICE, reviewed the seized material
12 that was provided to the FBI from the USMS. FBI IA Pulcastro
13 determined that none of the seized material infringed upon the
14 attorney-client privilege. After the two-part review was complete, the
15 seized, non-privilege material was provided to FBI SABT McEuen.

16 ECF Doc. 269.

17 Upon review of the discovery provided to the Defendant in this matter,
18 defense counsel advised the United States that FBI IA Pulcastro's name did appear
19 in one FBI-302 ("Report") and a string of internal FBI emails related to the
20 Report. After consulting with the FBI, the United States attempted to clarify FBI
21 IA Pulcastro's involvement during the Telephonic Conference on Friday, May 25,
22 2012. Although the United States initially intended to file a written clarification,
23 during the hearing defense counsel indicated that he was satisfied with the United
24 States' representation that FBI IA Pulcastro had a very limited participation on
25 May 9, 2011, and is not currently considered to be a percipient witness in the
26 United States' case-in-chief. Consequently, the United States decided to not file a
27 written clarification.

28 After the May 25, 2012, Telephonic Hearing, however, this AUSA was
29 contacted by the FBI concerning the prior representation of the review process.
30 After discussion with FBI, and review of an FBI-302 describing the search/review
31 process, this AUSA realized that he had misunderstood FBI's representation of the
32 review process and, as a result of that misunderstanding, unintentionally

1 misrepresented the process in ECF Doc. 269 and during the May 25, 2012,
2 Telephonic Hearing.

3 Therefore, in an effort to most accurately advise the Court and the
4 Defendant concerning the process used to by the U.S. Marshal Service and the
5 Federal Bureau of Investigation to separate potential privileged material (which
6 was not seized) and non-privileged material (which was seized and further
7 reviewed) the United States hereby attaches FBI SABB McEuen's Report of the
8 seizure/review process. *See Attachment.*¹

9 The United States respectfully submits this clarification.

10 DATED May 30, 2012.

11 Michael C. Ormsby
12 United States Attorney

13 *s/Russell E. Smoot*

14 Russell E. Smoot
15 Assistant United States Attorney
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20 ¹All non-relevant information has been redacted. Although FBI does not
21 consider U.S. Deputy Marshal Shafer to have been "part of the investigative
22 team," *see Attachment*, pg. 1, U.S. Deputy Marshal Shafer did handle an
23 explosive-trained canine during the execution of search warrants relevant to this
24 matter on May 9, 2011. Like FBI IA Pulcastro, the United States does not
25 currently considered Deputy Marshal Shafer to be a percipient witness in the
26 United States' case-in-chief.

1 I hereby certify that on May 30, 2012, I electronically filed the foregoing
2 with the Clerk of the Court using the CM/ECF System which will send
3 notification of such filing to the following, and/or I hereby certify that I have
4 mailed by United States Postal Service the document to the following non-
5 CM/ECF participant(s):

6
7 Matthew Campbell
8 Federal Defenders
9 10 North Post Street, Suite 700
10 Spokane, WA 99201

11 *s/Russell E. Smoot*

12 Russell E. Smoot
13 Assistant United States Attorney
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